A

Public Prosecutor v Awalluddin bin Sham Bokhari

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–7–01 OF 2016(W)
SURIYADI, ABU SAMAH NORDIN, RAMLY ALI, ZAHARAH IBRAHIM AND JEFFREY TAN FCJJ
7 NOVEMBER 2017

C

Criminal Law — Money laundering — Forfeiture — Whether properties sought to be forfeited obtained out of proceeds of unlawful activity — Whether evidence of prosecution rebutted on balance of probabilities — Whether properties ought to be forfeited — Procedure — Whether investigation officer conferred D *wide powers to investigate offence — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 32(2), 40 & 56(1)*

The appellant filed a criminal application for an order of forfeiture of the properties of the respondent and two others, pursuant to s 56(1) of the E Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'), and for a notice to be published in the *gazette* pursuant to s 61(2) of the Act calling upon any third party who had interest in the said properties to attend on the date as specified in the *gazette* to show cause as to why the properties should not be forfeited. There was no prosecution for F an offence under s 4(1) of the Act. The properties had earlier been seized pursuant to orders of seizure made under ss 45(1) and 50(1) of the Act. The crux of the appellant's case was that the properties had been obtained out of the proceeds of an unlawful activity. The High Court allowed the appellant's application and ordered the respondent's properties to be forfeited to the G government upon being satisfied that the applicant had, on balance of probabilities, shown that the respondent had acquired the properties out of proceeds of an unlawful activity. The High Court found that the respondent's income from his known legitimate sources were insufficient to support the purchases of the properties. Dissatisfied, the respondent appealed and the H Court of Appeal allowed the appeal on the grounds, inter alia, that the prosecution relied heavily on para 32 of the affidavit of the investigation officer which 'in substance was purely hearsay' and that the contents of the affidavit did not satisfy the criteria set out in O 41 r 5(1) of the Rules of Court 2012. Hence, the present appeal on the ground that the Court of Appeal erred in I holding that the affidavit of the investigation officer, in particular para 32 of DSP Amran bin Yaacob's affidavit, was 'in substance purely hearsay'. The appellant submitted that its case was not based on the affidavit of DSP Amran bin Yaacob alone but also the affidavit of DSP Ku Ismail bin Ku Awang and oral evidence of three rebuttal witnesses and that the Court of Appeal had totally

disregarded the affidavit evidence of DSP Ku Ismail bin Ku Awang and his oral evidence. A

Held, allowing appeal:

(1) Section 32 of the Act confers wide powers on the investigation officer in investigating an offence of money laundering or terrorism financing offence. Any property, record, report or document obtained by the investigation officer pursuant to s 32(2) of the Act are, by virtue of s 40 of the Act, admissible as evidence in any proceedings in any court for or in relation to an offence or any other matter under the Act or any offence under any other written law (see paras 22 & 33). B C

(2) Both DSP Amran bin Yaacob and DSP Ku Ismail bin Ku Awang affirmed in their affidavits that all the information contained therein were true and within their personal knowledge. What had been deposed by the two senior police officers in their affidavits, which were based on their personal knowledge acquired in the course of investigation under s 32 of the Act, could not be said as purely hearsay. The affidavits must be viewed in its entirety and should not be read in isolation and out of context. Paragraph 32 of the affidavit was not evidence per se. It was basically a conclusion based on information extracted from witnesses whose statements had been recorded by the investigation officer and from the numerous records and documents which were exhibited in the affidavit (see paras 25 & 32–33). D E

(3) The trial judge's findings that the respondent obtained the properties out of the proceeds of an unlawful activity was based on evidence before him. The respondent failed to rebut the evidence against him on the balance of probabilities. There was no compellable reason to interfere with the findings of fact by the trial judge. The Court of Appeal was in error in failing to consider the rebuttal evidence of witnesses called by the appellant. In the circumstances, the order of forfeiture made by the trial judge was reinstated (see para 34). F G

[Bahasa Malaysia summary

Perayu memfailkan permohonan jenayah bagi satu perintah rampasan harta responden dan dua orang lagi, di bawah s 56(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('Akta'), dan untuk satu notis diterbitkan dalam *warta* menurut s 61(2) Akta memanggil mana-mana pihak ketiga yang berkepentingan dalam harta-harta tersebut hadir pada tarikh yang dinyatakan dalam *warta* untuk menunjukkan sebab mengapa harta-harta tersebut tidak boleh dirampas. Tiada pendakwaan bagi kesalahan di bawah s 4(1) Akta. Harta-harta tersebut telah dirampas sebelumnya menurut perintah rampasan di bawah ss 45(1) dan 50(1) Akta. Perkara utama kes perayu adalah bahawa harta-harta tersebut diperolehi H I

melalui hasil aktiviti-aktiviti haram. Mahkamah Tinggi membenarkan permohonan perayu dan memerintahkan harta-harta responden dirampas kepada Kerajaan setelah berpuas hati bahawa perayu telah, atas imbangan kebarangkalian, menunjukkan bahawa responden memperoleh harta-harta tersebut hasil daripada aktiviti-aktiviti haram. Mahkamah Tinggi mendapati pendapatan responden datang dari sumber yang sah tidak mencukupi untuk menyokong pembelian harta-harta tersebut. Tidak berpuas hati, responden merayu dan Mahkamah Rayuan membenarkan rayuan atas alasan-alasan, antara lain, bahawa pihak pendakwaan menyandar dengan berat atas perenggan 32 afidavit pegawai penyiasat yang 'pada asasnya adalah dengar cakap semata-mata' dan bahawa kandungan afidavit itu tidak memenuhi ciri-ciri yang dinyatakan dalam A 41 k 5(1) Kaedah-Kaedah Mahkamah 2012. Dengan itu, rayuan ini atas alasan bahawa Mahkamah Rayuan khilaf dalam memutuskan bahawa afidavit pegawai penyiasat, khususnya perenggan 32 afidavit DSP Amran bin Yaacob, yang 'pada asasnya adalah dengar cakap semata-mata'. Perayu menghujahkan bahawa kesnya bukan berdasarkan afidavit DSP Amran bin Yaacob sahaja malahan afidavit DSP Ku Ismail bin Ku Awang dan keterangan lisan tiga saksi pematahan dan Mahkamah Rayuan tidak mengendahkan langsung keterangan afidavit DSP Ku Ismail bin Ku Awang dan keterangan lisannya.

Diputuskan, membenarkan rayuan:

(1) Seksyen 32 Akta memberikan kuasa yang luas kepada pegawai penyiasat untuk menyiasat kesalahan berkaitan pengubahan wang atau pembiayaan jenayah. Apa-apa harta, rekod, laporan atau dokumen yang diperoleh oleh pegawai penyiasat menurut s 32(2) Akta adalah, berikutan s 40 Akta, boleh diterima sebagai keterangan dalam mana-mana prosiding di mana-mana mahkamah bagi atau berkaitan dengan satu kesalahan atau apa-apa perkara lain bawah Akta atau apa-apa kesalahan bawah apa-apa undang-undang bertulis (lihat perenggan 22 & 33).

(2) Kedua-dua DSP Amran bin Yaacob dan DSP Ku Ismail bin Ku Awang mengesahkan dalam afidavit-afidavit mereka bahawa kesemua maklumat yang terkandung di dalamnya adalah benar dan dalam pengetahuan peribadi mereka. Apa yang dideposkan oleh kedua-dua pegawai polis kanan itu dalam afidavit mereka, yang berdasarkan pengetahuan peribadi mereka yang diperoleh dalam perjalanan penyiasatan bawah s 32 Akta, tidak boleh dikatakan sebagai dengar cakap semata-mata. Afidavit-afidavit tersebut mesti dipertimbangkan secara keseluruhannya dan tidak boleh dibaca secara berasingan dan di luar konteks. Perenggan 32 afidavit tersebut bukan keterangan per se. Secara dasarnya, ia adalah kesimpulan berdasarkan maklumat yang diperoleh daripada saksi-saksi yang keterangan mereka direkodkan oleh pegawai penyiasat dan daripada banyak rekod-rekod dan dokumen yang diekshibitkan dalam afidavit (lihat perenggan 25 & 32–33).

(3) Dapatan hakim bicara bahawa responden memperoleh harta-harta tersebut hasil aktiviti haram adalah berdasarkan keterangan di hadapan beliau. Responden gagal mematahkan keterangan terhadapnya atas imbangan kebarangkalian. Tiada alasan kukuh untuk campur tangan dengan dapatan fakta hakim bicara. Mahkamah Rayuan khilaf apabila gagal mempertimbangkan keterangan pematahan saksi-saksi yang dipanggil oleh perayu. Dalam hal keadaan tersebut, perintah rampasan yang dibuat oleh hakim bicara dikembalikan semula (lihat perenggan 34).]

Notes

For cases on forfeiture, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1707–1708.

Cases referred to

Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4(1), 32, 32(2), (2)(b), 40, 45(1), 50(1), 55(3), 56(1), (2), (4), 61(2), 70(1), Second Schedule
Evidence Act 1950 s 90A(2)
Federal Constitution
Penal Code s 420
Rules of Court 2012 O 41 r 5(1)

Appeal from: Criminal Appeal No W-09–339–11 of 2014 (Court of Appeal, (Putrajaya)

Tetralina bt Ahmad Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Mohd Yunos bin Shariff (Amran-Yunos) for the respondent.

Abu Samah Nordin FCJ:

[1] This is an appeal by the public prosecutor ('the appellant') against the decision of the Court of Appeal which set aside the order of forfeiture against the properties of the respondent, made by the Kuala Lumpur High Court pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act').

A BRIEF FACTS

[2] On 3 November 2011, the appellant filed a criminal application by way of a notice of motion for an order of forfeiture of the properties of the respondent and two others, pursuant to s 56(1) of the Act and for a notice to be published in the *gazette* pursuant to s 61(2) of the Act calling upon any third party who has interest in the said properties to attend on the date as specified in the *gazette* to show cause as to why the said properties should not be forfeited.

[3] Section 56(1) of the Act states:

> ... where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection (4)(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

[4] In this case, there was no prosecution for an offence under s 4(1) of the Act. The properties had earlier been seized pursuant to orders of seizure made under ss 45(1) and 50(1) of the Act.

[5] By the said application the appellant sought an order of forfeiture of the following properties of the respondent:

(a) a sum of RM7,274.60 in investment account No A80054198 with CIMB Bank Bhd Kuala Lumpur;

(b) a motorcycle BMW R 1200 RT bearing registration No WSX54;

(c) a motorcycle, Harley Davidson Sportster — XL 883N bearing registration No WTY54;

(d) a motorvan, Hyundai Starex TQ 2.5 GLS(A) bearing registration No WTM54; and

(e) a motorvan, Toyota Hilux Double Cab 2.5 AT bearing registration No WSH 854 ('the properties').

[6] The appellant's application was supported by the affidavits affirmed by a deputy public prosecutor and two senior police officers, namely DSP Amran bin Yaakob ('the investigation officer') and DSP Ku Ismail bin Ku Awang. Both officers filed lengthy affidavits supported by voluminous exhibits. The other two respondents, namely Simathari a/l Somenaidu and Sharafaizan bt Abdul Samad, did not appear at the hearing to contest the application and the High Court thereupon ordered their properties to be forfeited to the government.

The case before us is only between the appellant and the respondent. No third party made any claim to the properties. The respondent did not file any affidavit in reply. He elected to contest the application in person, by giving evidence on oath denying that the properties were acquired out of proceeds of an unlawful activity by showing, albeit unconvincingly, that they were acquired through legitimate sources of income including salary and loans from financial institutions. He also called three witnesses to testify on his behalf. In rebuttal, the appellant called three witnesses including the investigation officer, DSP Amran bin Yaakob. Thus, the decision of the High Court against the respondent was based on affidavit evidence as well as oral testimony of witnesses.

[7] The crux of the appellant's case was that the properties had been obtained out of the proceeds of an unlawful activity. The phrase 'unlawful activity' is defined in s 3 of the Act as 'any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence'. The term 'serious offence' refers to, among others, offences specified in the Second Schedule to the Act, which include the offence under s 420 of the Penal Code, that is, cheating and dishonestly inducing delivery of property. A person who engages directly or indirectly in a transaction that involves proceeds of any unlawful activity, knowing or having reason to believe that the property is proceeds from any unlawful activity, is said to be involved in money laundering: see definition of money laundering in s 3 of the Act. Money laundering is an offence under s 4(1) of the Act.

[8] The modus operandi of the respondent was quite straightforward. The respondent was an employee of Malaysia Airlines Bhd ('MAS'), who handled bookings by and sales of airline tickets, to passengers. He was also the sole proprietor of a firm, known as Ashha Leisure Resources, which carried on business as ticketing and commission agent.

[9] Simathari a/l Somenaidu (originally first respondent) was attached to the Administrative Section of Markas Tentera Laut ('MTL'), Ministry of Defence, Jalan Padang Tembak, Kuala Lumpur, whose duty was to prepare and issue air travel warrants to MAS via various travel agents on behalf of MTL's personnel. The air travel warrants were only for MTL's personnel and not for members of the public.

[10] Sharafaizan bt Abd Samad (originally second respondent) was a ticketing clerk at YHA Travel and Tours (M) Sdn Bhd. She had frequent dealings with the respondent relating to sales of airline tickets.

[11] The respondent, after receiving confirmed bookings of airline tickets from passengers, sent the names of the passengers to Sharafaizan bt Abd Samad,

who in turn contacted Simathari a/l Somenaidu for approval before the latter issued the air travel warrants to MAS via YHA Travel and Tours (M) Sdn Bhd. MAS would have to present the warrants to MTL for payment. Each air travel warrant consisted of four copies. The first copy (original) would be kept by MTL. The other three copies were given to the travel agent. The names of the approved passengers, who were members of the public were then entered in the copies of the air travel warrants together with the names of MTL's personnel. The names of members of the public would not appear in the original warrant. Tickets purchased by the use of the warrants were sold at lower prices. The tickets purchased by members of the public through the travel agents were sold at market price. Members of the public would not know what transpired between the respondent, Simathari and Sharafaizan. Sharafaizan then presented the warrants to MAS for payments and MAS in turn claimed reimbursement from MTL. As a result, MTL ended up paying MAS not only for the costs of travel by MTL's personnel but also the travelling costs of members of the public, whose names appeared in the warrants.

[12] The proceeds derived by the respondent through this modus operandi were used by the respondent to purchase the said properties or for investment. This modus operandi was explained in detail in the affidavit of DSP Ku Ismail bin Ku Awang and in the rebuttal testimony of the investigation officer, DSP Amran bin Yaacob.

THE HIGH COURT

[13] In determining whether the properties were the subject matter of an offence under s 4(1) of the Act, the court shall apply the standard of proof required in civil proceedings: see s 55(3) and s 70(1) of the Act. On 24 October 2014 the High Court allowed the appellant's application and ordered the respondent's properties to be forfeited to the government. The High Court was satisfied that the applicant had, on balance of probabilities, shown that the respondent acquired the properties out of proceeds of an unlawful activity. The respondent, on the other hand, had failed to discharge the burden to show that the properties had been acquired through his legitimate sources of income. The High Court found that his income from known legitimate sources were insufficient to support the purchases of the properties.

[14] The respondent, being dissatisfied, appealed to the Court of Appeal against the decision of the High Court. The respondent listed fourteen grounds of appeal in his petition of appeal. The Court of Appeal was of the opinion that there were only two issues for its determination, namely:

(a) Whether the trial High Court Judge had satisfied the first threshold of section 56(2) of the Act which required the Applicant to prove, on the balance of probabilities, that the seized properties were the subject matter

of or used in the commission of an offence under section 4 of the Act. A

(b) Whether the trial High Court Judge had evaluated the Appellant's evidence, on the balance of probabilities, before he granted the order of forfeiture in respect of the seized properties.

The correct provision is s 56(4), not s 56(2). B

[15] On 12 January 2016 the Court of Appeal allowed the respondent's appeal. The main ground was that the prosecution relied heavily on para 32 of the affidavit of the investigation officer which, 'in substance was purely hearsay' and that the contents of the affidavit also did not satisfy the criteria set out in O 41 r 5(1) of the Rules of Court 2012. Paragraph 32 of the investigation officer's affidavit states: C

> Saya seterusnya menegaskan bahawa saya telah menjalankan siasatan terhadap Saksi-saksi dan Responden-responden dan merekodkan percakapan Saksi-saksi dan Responden-responden di bawah Seksyen 32 AMLATFA 2001, yang mana saya sesungguhnya mempercayai dari keterangan-keterangan yang ada bahawa harta-harta alih yang disita di atas adalah harta-harta yang berkaitan dengan suatu kesalahan di bawah Subseksyen 4(1) AMLATFA 2001 yang mana kesemua harta tersebut telah diperolehi hasil daripada aktiviti haram iaitu hasil daripada pemalsuan Waran-waran Udara MTL untuk menipu TLDM bagi mendapatkan tiket-tiket kapal terbang untuk dijual kepada orang awam yang dilakukan oleh Responden Pertama bersama-sama Responden Kedua dan Responden Ketiga yang merupakan satu kesalahan di bawah Seksyen 420 Kanun Keseksaan. Sebahagian harta-harta Responden Pertama juga diperolehi daripada aktiviti haram iaitu hasil penipuan dalam tuntutan Waran-waran Bas MTL dan tuntutan perbatuan. D E F

[16] The Court of Appeal ruled that the learned trial judge 'was in grave error in even relying on an affidavit which is not worth the paper it is written on'. The other ground in setting aside the judgment of the High Court was that the order of forfeiture is against the law and the Federal Constitution. On this ground, we note that this was not an issue which was decided by the High Court nor was it raised in the petition as a ground of appeal. Perhaps, it would be useful to remind ourselves of what this court in *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590 said: G H

> While it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s 69(4) of the CJA and r 18(2) of the Rules of the Court of Appeal 1994, this is subject to the overriding discretion of this court to do justice. ... In so doing, it is however not the duty of the Court of Appeal, to invent or create a cause of action or a defence under the guise of doing justice for the parties as it is also trite that parties in litigation are bound by the four corners of their pleadings. I

[17] The essence of the judgment of the Court of Appeal can be seen in paras 12, 14 and 16 of its judgment:

12. The contents of the affidavit also do not satisfy the criteria set out in O 41 r 5(1). In consequence, the learned trial judge was in grave error in even relying on an affidavit which is not worth the paper it is written on.

14. Thus, when a case is dealt by affidavit as well as oral evidence, EA 1950 will become applicable save to say that where documents have been exhibited by affidavit, it remains admissible but the court has to deal with the totality of the evidence to give relevant probative value to the exhibits. Where an exhibit or evidence is credibly challenged the burden of proof of prima facie case placed on a plaintiff or petitioner and/or applicant as the case may be, does not shift even though in a normal trial by oral evidence a plaintiff's case on prima facie basis need to be established before the defence is obliged to call his evidence. If a prima facie case is not established, a defendant may elect not to call his evidence. The law in this area is well established. However, when the application is by affidavit and oral evidence, the applicant cannot rest on laurels to assume that the affidavit in support with the hearsay evidence and/or exhibit is sufficient to succeed on balance of probabilities, that too in a quasi-criminal Application like the Anti-Money Laundering and Anti-Terrorism Financing Act 2001, where the statute expressly says that the prosecution has to establish its case on the balance of probabilities.

16. We have read the appeal record and the able submission of the parties. After much consideration to the submission of the learned deputy public prosecutor, we take the view that the prosecution has not established the case according to law and the order of forfeiture is against the law and the Federal Constitution and in consequence the order of the High Court is set aside and the property seized is ordered to be returned to the appellant.

APPEAL TO THE FEDERAL COURT

[18] The appellant listed six grounds of appeal in his petition of appeal to this court but opted to proceed on only one ground, namely, that the Court of Appeal erred in holding that the affidavit of the investigation officer, in particular, para 32 of DSP Amran bin Yaacob's affidavit was 'in substance purely hearsay'. It was submitted that the appellant's case was not based on the affidavit of DSP Amran bin Yaacob alone. It was also based on the affidavit of DSP Ku Ismail bin Ku Awang and the oral evidence of three rebuttal witnesses who were called to rebut the respondent's testimony that he acquired the properties from income derived from his salary and earnings from his businesses and that his income was sufficient to purchase the properties. The Court of Appeal totally disregarded the affidavit evidence of DSP Ku Ismail bin Ku Awang and his oral evidence and the evidence of two other witnesses who were called to rebut the oral testimony of the respondent. DSP Ku Ismail bin Ku Awang deposed that he had interviewed and recorded statements from witnesses who purchased tickets from the respondent. He exhibited the warrants containing the names of the purchasers who were members of the public: see for example exhs KIKA 2, 3, 12, 14, 20 and 21. He had also prepared in minute detail, two charts (exhs P48 and P49) to show, for example who purchased the tickets and the amount paid. Exhibit P48 was a flow chart

which showed the amount of money paid in cash or cheques by the members of the public to the respondent, which were then deposited into several bank accounts of the respondent. These members of the public did not know that tickets purchased by the use of the warrants were sold at lower prices.

[19] It was contended by the appellant that the contents of the affidavits affirmed by both police officers and the documents exhibited therein were based on their personal knowledge which were directly obtained from witnesses in the course of their investigations under the Act. The powers of the investigation officer are clearly stated in s 32 of the Act. Any property, record, report or document produced pursuant to s 32(2)(b) of the Act, notwithstanding any written law to the contrary, shall be admissible as evidence in any proceeding in any court for or in relation to an offence or any other matter under the Act: see s 40 of the Act, which was overlooked by the Court of Appeal.

[20] The respondent denied that the properties were acquired out of proceeds of an unlawful activity. He claimed that they were legitimately acquired from income derived from his salary with MAS and earnings from his businesses. He also produced hire purchase agreements to show that he bought the motorcycles and the vehicles through loans from financial institutions. He admitted purchasing airline tickets for his clients on credit from Sharafaizan through his firm, Ashha Leisure Resources but denied knowing Simathari and that the tickets were purchased through the air travel warrants. He paid Sharafaizan for the tickets purchased through her. He did not deny that he knew the process of purchasing airline tickets through warrants issued by the government but claimed that the tickets were not purchased from MAS through air travel warrants issued to his firm. Learned counsel for the respondent reiterated in his submission what his client said in his testimony.

[21] The Act was enacted by Parliament in 2001 to provide for the offence of money laundering and terrorism financing offence, the necessary measures for the prevention of these offences and the powers for the forfeiture of the property involved in or derived from these offences and for matters incidental thereto: see the Long Title. It contains, among others, specific provisions on the powers of investigation, the admissibility of evidence and the standard of proof in determining whether the property is the subject matter of an offence or has been used in the commission of an offence of money laundering or a terrorism financing offence or whether the property is terrorist property.

[22] Section 32 of the Act confers wide powers on the investigation officer in investigating an offence of money laundering or terrorism financing offence. He may order any person whom he believes to be acquainted with the facts and circumstances of the case to:

A (a) attend before him for examination;

(b) to produce before him any property, record, report or document; or

(c) to furnish to him a statement in writing made on oath or affirmation.

B Any person who disobeys the order of the investigation officer commits an offence.

[23] The investigation officer is empowered to administer an oath or affirmation to the person being examined. The person being examined shall be C legally bound to answer all the questions and to state the truth save that he may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

D **[24]** The admissibility of the record of examination of any person or any property, record, report or document obtained by the investigation officer is governed by s 40 of the Act. The section overrides any written law or rule of law to the contrary. It states:

> E 40 The record of an examination under paragraph 32(2)(a), any property, record, report or document produced under paragraph 32(2)(b) or any statement under paragraph 32(2)(c) shall, notwithstanding any written law or rule of law to the contrary, be admissible as evidence in any proceedings in any court for, or in relation to, an offence or any other matter under this Act or any offence under any other written law, regardless whether such proceedings are against the person who was F examined, or who produced the property, record, report or document, or who made the written statement on oath or affirmation, or against any other person.

[25] Both DSP Amran bin Yaacob and DSP Ku Ismail bin Ku Awang affirmed in their affidavits that all the information contained therein were true G and within their personal knowledge. They obtained the information after examining and recording statements from persons who purchased the tickets from the respondent, Simathari and Sharafaizan. They exhibited copies of the air travel warrants, containing the names of members of the public, the bank accounts or bank statements of the respondent, the documents relating to H ownership of the vehicles, the hire purchase agreements and numerous other documents which they obtained in the course of their investigation. They also exhibited the relevant certificates under s 90A(2) of the Evidence Act 1950.

[26] DSP Amran bin Yaacob also prepared a flow chart (exh P33) showing I the names of members of the public who purchased tickets from the respondent at market price and whose names appeared in the air travel warrants. The respondent relayed their names to Sharafaizan by way of telephone calls or SMS. Sharafaizan in turn liaised with Simathari, for approval prior to the issuance of the air travel warrants.

[27] DSP Ku Ismail bin Ku Awang produced two flow charts: exhs P48 and P49. Exhibit P48 showed, among others, the names of members of the public who purchased tickets from the respondent, the amounts paid and the banks where the respondent deposited the money.

[28] Let us look at some of the names shown in exh P48 as illustrations. In December 2009, Zulkarnain bin Muhammad purchased return tickets for himself, his wife Zarinah bt Ismail, his friend Tun Hairuddin bin Abu Bakar and his wife for travel from KLIA to Dubai and back to KLIA from the respondent for a total sum of RM36,000. Zulkarnain also purchased return tickets for himself and his wife to perform Umrah and paid RM6,000 to the respondent. Between June 2010 and July 2010, Fatimah bt Abd Rahman booked return tickets for travel from KLIA to London and back to KLIA for herself, Wilson Bayan Dandot, Ismuni bin Ismail, Kamil Danial Yap, Justine Jinggut and Norlia bt Abd Rahman from the respondent at a cost of about RM90,000.

[29] Sometime between February 2010 and March 2010, Abu Bakar Fikri bin Sulaiman booked a return ticket for travel from KLIA to London and back for RM21,000. In June 2009 Ahmad Johari bin Abd Razak and his wife Nooralzeila bt Junid bought return tickets for travel from KLIA to London and back to KLIA at a cost of RM30,000. All these names appeared in the air travel warrants (see exhs KIKA 2, KIKA 3, KIKA 20, 21, KIKA 12 and KIKA 14). These were not isolated incidents. It showed a pattern of behaviour. The sum total of money paid to the respondent from the sales of these tickets exceeded the respondent's income from his salary and earnings from his businesses. What had been deposed in DSP Ku Ismail bin Ku Awang's affidavit was neither disputed nor challenged by the respondent. The way the respondent operated was highly questionable. Why did an employee of MAS who handled bookings and sales of airline tickets to passengers and carrying on business as a ticketing and commission agent through his own firm Ashha Leisure Resources, chose to purchase tickets for his passengers through another travel agent, YHA Travel and Tours (M) Sdn Bhd or its ticketing clerk Sharafaizan? What was his intention? It was not disputed that Simathari used to issue air travel warrants to MAS through YHA Travel and Tours (M) Sdn Bhd. Tickets purchased by way of air travel warrants were priced lower than the market price.

[30] Exhibit P49 was a flow chart showing the vehicles acquired by the respondent out of the proceeds of an unlawful activity, the amount of monthly instalments and the banks from whom the respondent obtained the loans. It also showed the account number where the respondent invested his money. DSP Ku Ismail bin Ku Awang deposed that the income derived from the respondent's salary and earnings from his businesses were not sufficient to purchase the properties. That was also the finding of the learned trial judge.

A **[31]** In an application for an order of forfeiture of property under s 56(1) where there is no prosecution, the standard of proof to determine whether the property has been obtained as a result of or in connection with an offence under s 4(1) is the standard of proof required in civil proceedings: see s 56(4) of the Act. Any question of fact to be decided by the court in proceedings under the B Act shall be decided on the balance of probabilities: see s 70(1) of the Act.

[32] We have read the affidavits of DSP Amran bin Yaacob and DSP Ku Ismail bin Ku Awang in their entirety. What was deposed in para 32 of DSP Amran bin Yaacob's affidavit should not be read in isolation and out of context. C The affidavit must be viewed in its entirety. Paragraph 32 of the said affidavit was not evidence per se. It was basically a conclusion based on information extracted from witnesses whose statements had been recorded by the investigation officer and from the numerous records and documents which were exhibited in the affidavit.

D

[33] Any property, record, report or document obtained by the investigation officer pursuant to s 32(2) of the Act are, by virtue of s 40 of the Act, admissible as evidence in any proceedings in any court for or in relation to an offence or any other matter under the Act or any offence under any other written law. The E Court of Appeal was clearly in error in holding that para 32 of the investigation officer's affidavit was 'purely hearsay'. It also erred in ruling that the learned trial judge committed an error in relying 'on an affidavit which is not worth the paper it is written on'. What had been deposed by these two senior police officers in their affidavits, which were based on their personal knowledge F acquired in the course of investigation under s 32 of the Act, could not be said as purely hearsay.

[34] The Court of Appeal was also in error in failing to consider the rebuttal evidence of witnesses called by the appellant. The learned trial judge's findings G that the respondent obtained the properties out of the proceeds of an unlawful activity was based on evidence before him. The respondent failed to rebut the evidence against him on the balance of probabilities. There was no compellable reason to interfere with the findings of fact by the learned trial judge. H Accordingly, we allow the appeal, set aside the decision of the Court of Appeal and reinstate the order of forfeiture made by the learned trial judge.

Appeal allowed.

I Reported by Afiq Mohamad Noor